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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24561

October Term 1956

In the Matter of the Petition for
Review of the Application of

CHA'O LI CHI,

also known as Cha'o Pieh Chi,

Petitioner-Appellant,

—against—

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization for the District of New York,

Respondent-Appellee.

BRIEF AND APPENDIX OF APPELLANT

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Respondent-Appellee.

BRIEF OF APPELLANT

Preliminary Statement

The petitioner appeals from a decision and order of the District Court for the Southern District of New York (McGohey, *D.J.*) granting summary judgment to the respondent and dismissing petitioner's complaint on the ground that respondent acted lawfully in concluding that petitioner had failed to establish reasonable ground for his asserted fear of persecution if returned to China (App. 12a-16a).

Statute Involved

Section 6 of the Refugee Relief Act of 1953 (67 Stat. 401, 50 U. S. App. 1971d) provides:

> "Sec. 6. Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide non-immigrant and that because of events which have occurred subsequent to his entry into the United States he is unable to return to the country of his birth, or nationality, or last residence, because of persecution or fear of persecution on account of race, religion, or political opinion, may, within one year after the effective date of this Act, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of the enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscel-

laneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. If, within the above specified time, the Congress does not pass such a concurrent resolution, or, if either the Senate or the House of Representatives passes a resolution stating in substance that it does not approve the granting of the status of an alien lawfully admitted for permanent residence, the Attorney General shall thereupon deport such alien in the manner provided by law: *Provided*, That the provisions of this section shall not be applicable to any aliens admitted into the United States under the provisions of Public Law 584, Seventy-ninth Congress, second session (60 Stat. 754), Public Law 402, Eightieth Congress, second session (62 Stat. 6): *Provided further*, That the number of aliens who shall be granted the status of aliens lawfully admitted for permanent residence pursuant to this section shall not exceed five thousand."

Questions Presented

1. Whether the administrative decision, based in part upon confidential information the broad nature of which was disclosed, was so contrary to all the evidence as to be arbitrary and capricious.

2. Whether the use of confidential information was unlawful and unconstitutional in that (A) it was not authorized by the Refugee Relief Act of 1953, (B) was prohibited by the Administrative Procedure Act of 1946, and (C) denied appellant due process of law.

Facts

Petitioner has been in the United States since he came to this country in February 1939, as a child of 11, a member of the family of his father, an accredited diplomatic official of the Chinese Nationalist Government (App. 29a). The father returned to Nationalist China on orders of his government in 1946 (App. 29a) and the rest of the family returned to China in 1950. In a deportation proceeding on December 14, 1952 petitioner was denied the privilege of suspension of deportation and voluntary departure and ordered deported to China (App. 4a). Thereafter on June 16, 1955 the Acting Regional Commissioner approved a recommendation of the Special Inquiry Officer that petitioner's application for adjustment of his status to permanent residence under §6 of the Refugee Relief Act of 1953 (50 U. S. C. App. 1971d) be denied on the ground that petitioner was inadmissible under §212(a)(27) of the Immigration and Nationality Act (8 U. S. C. 1182(a)(27)) and therefore ineligible for adjustment under §6 of the 1953 Act (App. 17a-19a).

In this action by petitioner to review the legality of this administrative decision the District Court (Noonan, *D.J.*) held that the petitioner had been denied due process of law "by reason of his not being informed of the nature of the confidential information against him" (App. 8a) and ordered that petitioner is entitled "to know the broad nature of the 'secret and confidential' information being used against him" (App. 9a).

In the reopened hearing the Special Inquiry Officer stated (App. 23a-24a) that the broad nature of the confidential information was as follows:

> "By Special Inquiry Officer: First, it is indicated that this applicant is not as anti-communistic in political

opinion as would appear from his application for adjustment of status because of his very close relationship with his half-brother, Chi Chao Ting, who in the past is reported as having been active in the communist cause. Also, because of his close relationship with his father, Mr. K. C. Chi, who, it is reported, was a former editor of the China Daily News published in the city of New York, which paper is popularly known as the Chinese communist publication in New York City, and who is reported to have returned to the mainland of China to accept a post at Peiping University under the sponsorship of the Chinese People's Republic.

Secondly, because of this applicant's own testimony to the effect that in the early days of the communist coup in China he was favorably impressed with such activity.

Third, because of his reported activity in behalf of the Chinese Students Christian Association which in 1949 was reported to have been led by pro-communist persons, at which time the applicant is reported to have upheld communism as being better than the capitalist system.

Fourth, the applicant's reported participation in a communist inspired brotherhood festival conducted at the People's Drama Theatre, 812 Eldridge Street, New York, at three p.m. Sunday afternoon, February 11, 1951.

Fifth, the applicant's close association with persons other than his immediate family reported to be active in communist activities in the United States, specifically, one Kee Min Ta.

Sixth, the applicant's reported membership in the American Youth for Democracy, an organization also reported as active in communist affairs."

A request for the specific evidence upon which these allegations were based was denied (App. 25a-26a).

As to the first allegation, the petitioner then testified that his half-brother, allegedly a communist, was a person whom he has not even seen since the time of the Bretton Woods Conference (1944) when he was an official of the Chinese Nationalist Government and therefore he could not possibly have maintained a "close" relationship with him (App. 27a-28a). As for his father, petitioner testified that he was a Chinese Nationalist Government official and returned to China in 1946 to a post at Peiping University under that Government (App. 29a) and not under the Chinese People's Republic as erroneously stated in the confidential information supplied to respondent. He further testified that the China Daily News, alleged to be communistic at the present time, could not have been so prior to 1946 and in 1940 to 1942 at which time his father was one of the editors because such activities would certainly have led to severance of his official connection with the Chinese Nationalist Government (App. 32a).

On the second charge, applicant's former testimony that he had been favorably impressed with the activity of the Chinese Communists in the early days of the communist coup in China, he explained that he was influenced by various reports of corruption in the Nationalist Government and of proposed land reforms by the communists about which he had no personal knowledge (App. 34a-36a). He testified to his disillusionment and his recognition that the communist regime had brought a repugnant terrorism and regimentation to China (App. 36a).

Petitioner denied (Third Charge) membership in or activity on behalf of the Chinese Christian Students Association or support of communism as better than capitalism (App. 36a-37a); admitted (Fourth Charge) dancing as a

professional dancer for a fee at the People's Drama Theater on one occasion but denied any knowledge of the alleged political motives of the sponsors (App. 39a). He answered the Fifth Charge of reported close association with persons reportedly active in communist matters, specifically one Kee Min Ta, by explaining that he accepted him as a roommate because of their mutual interest in professional dancing and later became aware of his political interests which petitioner did not share (App. 39a-41a).

Petitioner admitted his reported membership in the American Youth for Democracy (Sixth and last Charge) for a short time in 1943 while he was attending St. John's College. He stated that he never belonged to any other chapter of the American Youth for Democracy and at that time the chapter to which he belonged was not devoted to political affairs except the common war effort (App. 42a).

On the statutory issue of petitioner's fear of persecution if returned to Communist China he testified that he did not agree with communism on principle; that he would be unwilling to work as an entertainer for the Chinese Communist Government because he did not believe in its goals, and upon refusal to work he might very well be made an example of and imprisoned (App. 43a). He stated that he would be regarded with great suspicion in Communist China since he refused to return with his family and has consistently refused requests received from his family to return to China, and because of his residence and education in the United States since he was eleven years old and his strong attachment to the traditions of the United States (App. 42a-43a). He testified that he has never been actively in favor of communism and has been against communism and that he actually is afraid of persecution if returned to China (App. 45a).

The Special Inquiry Officer referred to the petitioner's admission of sympathy with the communist regime in China

at its beginning in the belief that it was for the betterment of the average Chinese and his testimony of his change to an anti-communist point of view because of events in China, and then concluded that petitioner failed to establish reasonable grounds for his asserted fear of political persecution in China (App. 19a). The Acting Regional Commissioner adopted the Special Inquiry Officer's recommendation that petitioner's application be denied (App. 19a). The District Court (McGohey, *J.*) granted summary judgment to the respondent on the ground that it could not be said that the Attorney General's representatives acted arbitrarily or unfairly in concluding that petitioner had failed to sustain his burden of establishing a reasonable ground for his asserted fear of persecution if returned to Communist China (App. 15a).

Argument

At the outset and in the interests of clarity the present case must be distinguished from cases in which the use of confidential information, withheld from the courts upon judicial review as well as from the alien in the administrative proceeding, presented the fundamental question whether Congress authorized the use of confidential information and if so whether such use denied due process of law. *Jay* v. *Boyd*, 351 U. S. 345; *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537. In this case the Government did not appeal from but acquiesced in Judge Noonan's decision and disclosed the broad nature of the confidential information although it continued to withhold from appellant the specific confidential information in the form of the investigative reports or the statements of informants.

The administrative decision based in part on this limited disclosure presents for judicial determination two basic questions. The first question, assuming that limited dis-

closure offers minimal procedural due process, is whether the administrative record as a whole including the disclosed information supplies substantial evidence to support the denial of appellant's application for adjustment under §6 of the Refugee Relief Act of 1953, hereinafter called the 1953 Act. If the record does not support the administrative decision it is arbitrary and invalid and the Court should rule that the appellant has established fear of persecution under §6 of the 1953 Act or, in the alternative, remand the case to the respondent for still further administrative proceedings. Only if the Court rules that the record including the confidential information sufficiently supports the administrative determination does it become necessary to reach the second question, namely, whether Congress in proceedings under §6 of the 1953 Act has authorized the use of confidential information disclosed in this limited manner.

Stated in another way, the first question is one of the scope of judicial review and the argument assumes that the limited disclosure makes the confidential information available as part of the record. The second and more fundamental question, not restricted to the facts in this case, is whether Congress has authorized the use of confidential information providing it is disclosed in this limited manner to the alien.

I.

Even if disclosure of the broad nature of the confidential information authorized reliance upon it, the administrative decision based thereon was so contrary to all the evidence as to be arbitrary and capricious.

Judge Noonan ruled that in view of the fact that §6 of the 1953 Act required the Attorney General to make a determination "based on all of the pertinent facts and circumstances, rather than merely to exercise his opinion on the matter, Congress must have intended that the alien should be informed of the nature of the information being used against him so that he might attempt to rebut it" (App. 7a). Assuming *arguendo* that disclosure of the broad nature of the confidential information was sufficient to grant appellant a procedurally adequate hearing, it is appellant's contention that the administrative determination that appellant did not establish his fear of persecution completely lacks support in the record and is arbitrary.

The respondent perforce must rely for the adverse administrative decision upon the confidential information because that is the only "evidence" in the record even allegedly adverse to appellant. The respondent must contend that disclosure of the "broad nature" of the confidential information sufficiently removed any objectionable confidential or secret stigma and transmuted it into admissible "evidence" supplying a substantial basis for the administrative decision protecting it from reversal on judicial review. Of course the respondent may also argue that the special inquiry officer relied on the specific information not disclosed and that its use is authorized by Congress and not subject to judicial review because that specific information is not in the record. This seems to have been Judge McGohey's view although not Judge Noonan's view.

The appellant contends that even the confidential information as disclosed by respondent and explained by appellant does not support the decision and that applying the proper scope of judicial review the administrative decision should be reversed.

1. *The evidence established fear of persecution.*—The reopened administrative hearing was devoted largely to the disclosure of the broad nature of the six categories of confidential information stated by the special inquiry officer (App. 23a-24a) and to the appellant's sworn testimony concerning these categories of information (App. 26a-42a). The Special Inquiry Officer expressly refused appellant's request to reveal specific information upon which the general information disclosed was based or the sources of the information (App. 23a, 25a-26a). The nature of the confidential information and appellant's evidence in respect thereto was such that upon conclusion of the hearing no rational reliance could be placed upon the confidential information as a basis for denying the application as will readily appear from brief reference to the six categories of information and appellant's testimony thereon:

a. *First charge—appellant's relationship with half-brother and father.*—The first charge that appellant's close relationship with his half-brother and father indicates that appellant was not anti-communistic in political opinion was wholly demolished by incontrovertible evidence brought out in appellant's testimony. Appellant convincingly explained that he never had the alleged close relationship with his half-brother and in any event he had not even seen him since 1944 when his half-brother was an official of the Chinese Nationalist Government. He has not seen his father since the latter returned to China in 1946. This testimony wholly disposed of the charge of appellant's

close relationship with his half-brother and father. Moreover, the allegation that his father, a former editor of the Chinese Daily News now popularly known as communistic, was "reported to have returned to the mainland of China to accept a post at Peiping University under the sponsorship of the Chinese Peoples Republic" was completely answered by appellant's testimony that his father returned to Peiping in 1946 when it was under the control of the Nationalist Government and not the Peoples Republic and by his testimony that his father was editor of the China Daily News from 1940 to 1942 when he was an official of the Chinese Nationalist Government and long before the publication was popularly known as communistic.

b. *Second charge—appellant's initial friendly reaction to Chinese Communists.*—Appellant always openly and honestly admitted that he shared with others, many of them much older and more astute politically than appellant, the illusion that communism might bring agrarian reforms and benefit the Chinese populace. But there is no suggestion that he lied when he swore that he also shared the disillusionment with Chinese Communism and deplored the terror which it practiced. There is no possible basis for disbelieving appellant's testimony that he became disillusioned and condemned Chinese Communism particularly when it is recognized as an historical fact that this was the common experience of many persons outside of China at the time of the revolution, including the highest officials of the Department of State of the United States.

c. *Third charge—activity on behalf of Chinese Christian Students Association.*—The appellant's testimony that he was never a member of or active on behalf of the Association and his express sworn denial of his reported "support of communism as better than capitalism" (App. 36a-37a)

certainly is adequate to refute a charge in such general terms where the Government refuses to specify the evidence on which such a charge is based in order to give appellant an opportunity for more specific denials. In the face of such a general charge he could do no more than deny it under oath when his position is that he never engaged in such activities.

d. *Fourth charge—participation in a communist festival at Peoples Drama Theater on February 11, 1951.*—The appellant explained that his appearance on this occasion was as a professional dancer for a fee without any knowledge of the alleged political motives of the sponsors. In view of the fact that appellant was a professional dancer his sworn explanation completely answers this charge.

e. *Fifth charge—close association with Kee Min Ta.*—Appellant completely explained that his association with this individual was based on their mutual interest in professional dancing and not in any way related to the political views of Kee Min Ta. Certainly there is no basis for disbelieving the appellant's entirely credible story that this acquaintanceship was not based on politics and its termination was based on a purely personal ground—as appellant said "He threw out my cat" (App. 40a).

f. *Sixth charge—membership in American Youth for Democracy.*—The appellant fully explained his "reported membership in the American Youth for Democracy" by sworn testimony that he was a member of one chapter of this organization for a few months in 1943 while attending St. John's College.

In addition to completely answering the charges contained in the confidential information the appellant convincingly testified that because of his long uninterrupted residence in the United States since he came here as a

child of eleven in 1939, and his education here and his attachment to our traditions, he feared persecution in Communist China where he would be regarded with great suspicion and for these reasons he had consistently refused overtures to return to China even though his entire family had returned to that country prior to the completion of the communist conquest of the mainland (App. 42a-45a). This sworn testimony supplies all the evidence that any applicant could normally be expected to supply in order to establish his fear of persecution. The Government did not in any way attempt to rebut this evidence but apparently relied entirely upon the general confidential information which he explained completely. The Special Inquiry Officer in his very short decision denying appellant's application, merely stated that despite the denial of the allegations in the confidential information appellant failed to establish reasonable grounds for his fear of persecution for his political opinions. Thus the Special Inquiry Officer apparently relied upon the general confidential information which was so completely refuted by appellant in his testimony. It is to be noted that the Special Inquiry Officer's decision recommending denial contains a general conclusion against appellant but does not even in substance comply with the requirement of the regulation (8 C. F. R. 245a.11) that he "shall prepare a memorandum of his findings as to each of the essential facts prescribed by section 6 * * *."

2. *Scope of judicial review.*—The appellant contends that the scope of judicial review of the evidence is that the administrative determination must be supported by substantial evidence. *Lloyd Sabaudo* v. *Elting*, 287 U. S. 329; *Section 10(e)(5) of the Administrative Procedure Act of 1946* (5 U. S. C. 1009); *Fong Sen* v. *Immigration and Naturalization Service*, 137 F. Supp. 236 (E. D. La.), aff'd 234 F. 2d 656 (C. A. 5). Judge Noonan's opinion recognized

that the 1953 Act requires the Attorney General "to make a determination based on all of the pertinent facts and circumstances, rather than merely to exercise his opinion on the matter (App. 7a). It is submitted that the statutory requirement that the Attorney General make an administrative determination implies the usual substantial evidence scope of judicial review.

It is submitted that Judge McGohey, in his opinion upholding the administrative decision not on the basis that it was supported by substantial evidence but rather on the basis that Congress "has vested the Attorney General with wide discretion in immigration matters" (App. 14a), erroneously relied upon two decisions of this Court (*U. S. ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 and *U. S. ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392) involving not §6 of the 1953 Act but the wholly different language of §243(h) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1253(h)) which expressly authorizes the Attorney General to withhold deportation "to any country in which in his *opinion* the alien will be subject to physical persecution • • •" (emphasis supplied). See also *Jay* v. *Boyd*, 351 U. S. 345.[1]

The language of the 1953 Act, however, is so different from the language of the 1952 Act granting the Attorney General the broadest discretion to withhold or to suspend deportation that it cannot be implied that Congress intended to prohibit judicial review under the usual substantial evidence rule to determine whether the applicant under §6 of the 1953 Act had reasonable grounds for fearing

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1 In *Jay* v. *Boyd* the then majority of the Supreme Court (including Reed and Minton, *JJ.*) held that Congress in §244 of the 1952 Act (8 U. S. C. 1254) similarly authorized the denial of suspension of deportation upon confidential information utilized pursuant to a regulation requiring the officer relying on such information to be of the opinion that its disclosure "would be prejudicial to the public interest, safety or security" (8 C. F. R. §244.3).

persecution if deported. Section 6 of the 1953 Act offers the political asylum of permanent residence in the United States to any alien who "establishes" because of events subsequent to his lawful entry prior to July 1, 1953 that he is unable to return to the country of his birth, nationality or last residence because of persecution or "fear of persecution" on account of race, religion or political opinions. The first sentence of §6 which sets forth the statutory requirements for inclusion in this category of refugees does not delegate the determination of each case to the Attorney General to be decided "in his discretion" or "in his opinion," as in the case of suspension or withholding of deportation under §§243(h) and 244 of the 1952 Act. On the contrary the test of compliance with the statutory requirements is cast in objective terms in that the alien is required to "establish" that he is within the class of refugees. To the extent that the test of compliance could be considered subjective at all the determination is delegated not to the Attorney General but to the applicant in that he is not required to establish inability to return home because of actual persecution but merely because of his "fear of persecution."[2] Such an objective statutory standard at the most requires the alien applicant to establish his eligibility by substantial evidence to be considered in the first instance by the administrative officials and reviewed by the courts in accordance with the ordinary rules of administrative law which give due weight to the administrative determination.

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2 The language of §6 of the 1953 Act is very similar to the language of §4(b) of the Displaced Persons Act of 1948 (50 U. S. App. 1953(b)) which defined a displaced person residing in the United States eligible to apply for adjustment of his immigration status as "a person displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the out-break of World War II, and that he cannot return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions."

This view that §6 was intended to utilize ordinary standards of administrative determination of facts establishing the applicant's eligibility is reinforced by the remainder of §6 which provides that if the Attorney General "upon consideration of all the facts and circumstances of the case" shall "determine" that the alien is a person of good moral character, was present in the United States on August 7, 1953, the date of enactment of the statute, and is qualified for admission as an immigrant the Attorney General "shall report to the Congress all the pertinent facts in the case." Unless Congress affirmatively approves permanent residence for the alien the Attorney General is directed to deport him. Thus it appears that Congress reserved to itself the exercise of discretion or opinion and restricted the Attorney General to a "determination" of the facts "established" by the alien, which connotes ordinary administrative action based on the evidence and not an extraordinary delegation of the matter to the opinion or discretion of the Attorney General. *Cheng Fu Shen* v. *Barber*, 144 F. Supp. 913, 916 (N. D. Cal.).[3]

It is significant of the intent of Congress that in §6 of the 1953 Act, dealing with refugees seeking asylum in the United States, it adhered to the language of §4(b) of the Displaced Persons Act of 1948 similarly granting asylum to such persons and did not amend the language to give the Attorney General broad discretion as it did amend the language of §23 of the Internal Security Act of 1950 in §243(h) of the 1952 Act to substitute the Attorney General's "opinion" for the former requirement that the

3 Words such as "establish" and "determine," unlike words delegating matters to the Attorney General's discretion or opinion, as used for administrative proceedings, connote an adjudication based on substantial evidence. *Gooch Milling Co.* v. *Commissioner of Internal Revenue*, 133 F. 2d 131, 137 (C. A. 8); *Cole* v. *Saranac Lake General Hospital*, 282 App. Div. 626, 125 N. Y. S. 2d 891 (3rd Dept.).

Attorney General "shall find" that the alien would be subjected to physical persecution (*U. S. ex rel. Moon* v. *Shaughnessy, supra*) and as it did amend the language of §19(c) of the Immigration Act of 1917 (as amended by the Alien Registration Act of 1940) to substitute the Attorney General's "discretion" for his finding on the issue of suspension of deportation (*Jay* v. *Boyd, supra*).

It is also of some significance that in administering §4 of the Displaced Persons Act of 1948, before Congress delegated broad discretion to the Attorney General in respect of suspending and withholding deportation in the 1952 Act, the Commissioner of Immigration and Naturalization accepted the testimony of Chinese aliens concerning their opposition to communism as sufficient basis for their fear of persecution if returned to China. *In the Matter of T.-C.*, Interim Decision No. 212, decided November 7, 1950 (reported in Immigration and Naturalization Service "Monthly Review," December 1950, pp. 95-98).[4] In the 1953 Act Congress has adhered to the language of the 1948 Act and the respondent cannot claim greater discretion to reject evidence of fear of persecution under the 1953 Act because Congress has delegated broader discretion to the Attorney General on the similar question of persecution in respect of withholding deportation under §243(h) of the 1952 Act. See *D'Antonio* v. *Shaughnessy,* 139 F. Supp. 719, 723 (S. D. N. Y., Herlands, *D.J.*).

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4 This decision states in part:

"FEAR TO RETURN: The applicant's testimony above related to displacement based upon his fear of persecution will be utilized to establish that other cardinal eligibility requisite, namely, that the applicant is unable to return to the country of his birth, nationality, or last residence because of persecution or fear of persecution on account of his race, religion, or political opinions. His testimony with respect to his opposition to Communism, and the acknowledgment that China is at this time a Communist-dominated country establishes that the applicant is unable to return to China because of his fear of persecution on account of his political opinions."

Appellant's construction of §6 gains further support from the published regulations of the Attorney General (8 C. F. R. 245a). Section 245a.11 provides that the immigration officer "shall prepare a memorandum of his findings as to each of the essential facts prescribed by section 6" and that if he recommends denial "a copy of his memorandum shall be furnished to the applicant or his attorney or representative pursuant to §§292.11 and 292.12 of this chapter." Section 292.11(a) provides for service of any papers in a proceeding upon the alien's attorney and §292.12 provides that service shall be by personal service or registered mail. Section 292.11(b) provides that whenever an examination is provided for in a case before the Service the person involved shall have the right to be represented at the examination by an attorney or representative, "shall be permitted to examine or cross-examine such person and witnesses, introduce evidence, to make objections which shall be stated succinctly and entered on the record and to submit briefs." The appellant submits that the quoted regulation concerning cross-examination of witnesses clearly implies the right to a customary fair administrative hearing and the usual scope of judicial review to determine whether the administrative decision is supported by substantial evidence.

It need not be labored here that if Congress has not plainly delegated the question of fear of persecution to the Attorney General to be decided wholly in his discretion or solely upon his opinion the courts will not strain to imply such a broad delegation where there is involved the serious personal consequence of relegating to a communist country an individual who has lived in the United States under the protection of the Constitution since 1939. *Chew* v. *Colding*, 344 U. S. 590, 601-602.

In conclusion on this point the appellant submits that in §6 of the 1953 Act Congress has not departed from the

ordinary scope of judicial review to determine whether the administrative decision is supported by substantial evidence. The application of that standard of review to the facts of this case requires the determination that upon all the evidence, even including the disclosed confidential information, there is no substantial evidence to support the administrative determination and the evidence requires the contrary determination that the appellant has established fear of persecution if returned to China. It is submitted that there is no need for any further administrative hearing and the Court should direct the respondent to grant the appellant's application on the present record.

II.

Congress did not authorize use of confidential information in proceedings under §6 of the 1953 Act.

If it be determined that the administrative record supplies sufficient evidentiary support for the administrative determination it becomes necessary to decide whether Congress authorized the use of confidential information in proceedings under §6 of the 1953 Act even if the Act be construed as requiring disclosure of the "broad nature" of the confidential information. The appellant contends that (A) Congress did not authorize the use of confidential information; (B) the Administrative Procedure Act of 1946 forbids the use of such confidential information, and (C) the use of such information violated appellant's rights to due process of law under the Fifth Amendment.

A. *Congress did not authorize use of confidential information.*

In the absence of a statutory provision expressly authorizing the use of confidential information and the denial of

a hearing, such as §235(c) of the 1952 Act (8 U. S. C. 1225 (c)), the courts have approved the use of confidential information where Congress has delegated to the Attorney General the authority to grant discretionary relief on the basis of his "opinion" or in his discretion[5] apparently on the theory that Congress did not contemplate that the alien would receive a hearing in the usual sense but merely the dispensation of grace by the Attorney General as in the case of a pardon. *Jay* v. *Boyd, supra; U. S. ex rel. Moon* v. *Shaughnessy, supra.* Moreover, the use of confidential information in such cases was supported by regulations expressly permitting its use and issued pursuant to the statutory power delegated to the Attorney General to establish regulations to carry out his authority under the Act (§103(a) of the 1952 Act, 8 U. S. C. 1103(a)). See 8 C. F. R. §242.17(c) providing that the Special Inquiry Officer in determining an application for discretionary relief may consider and rely upon non-record information only when the Commissioner has determined that it is in the interests of national security and safety to do so. See also §243.3(b)(2) providing that the decision to withhold deportation shall be made upon consideration of all evidence submitted by the alien "and any other pertinent evidence or available information."

The appellant submits that Judge Noonan correctly concluded that Congress contemplated that a hearing should be obtained in proceedings under §6 of the 1953 Act and the alien should be given an opportunity to "establish" the facts and the Attorney General should make a "determination" on the facts. The necessary implication from the statutory provision contemplating a hearing is that confidential information could not be used because a "hearing" at which

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5 But cf. *U. S. ex rel. Dongas* v. *Robinson*, 142 F. Supp. 452 (N. D. Ill.), *Orahovats* v. *Brownell*, 134 F. Supp. 84 (D. C. D. C.), *Maeztu* v. *Brownell*, 132 F. Supp. 751 (D. C. D. C.).

the alien is invited to submit evidence and then the decision is made in part upon confidential information which he has no opportunity to know or meet is no hearing at all. *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9); *Boudin* v. *Dulles*, 136 F. Supp. 218, aff'd 235 F. 2d 532 (C. A. D. C.); *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. C.); *Mazza* v. *Cavicchia*, 15 N. J. 496, 101 A. 2d 545.[6]

The absence of authority to use confidential information is supported by the regulations governing proceedings under §6 of the 1953 Act which do not authorize the use of confidential information but require the immigration officer to make findings of the essential facts prescribed by §6 (8 C. F. R. 245a.11). Moreover, this regulation impliedly denied authority to use confidential information by providing that the alien shall be permitted to cross-examine witnesses (8 C. F. R. 292.11(b)). This right to cross-examine is, of course, denied by the use of confidential information even where its "broad nature" is disclosed.

Another cogent reason for not attributing to Congress an intent to authorize by implication the use of confidential information is supplied by the fact that the use of such information has been criticized in Congress itself as "at complete variance with basic common law precepts • • • ." *House Report No. 1458*, 84th Cong., 1st Sess., p. 14 (1955); *Hearings Before Subcommittee on Legal and Monetary Affairs of the House Committee on Government Operations*

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6 Chief Justice Arthur T. Vanderbilt stated:

"In any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. 'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.' • • • [U]nless this principle is observed, the right to a hearing itself becomes meaningless."

on "Practices and Procedures of the Immigration and Naturalization Service in Deportation Proceedings," 84th Cong., 1st Sess., p. 167 (1955); cf. *Jay* v. *Boyd, supra*, p. 365.

Moreover, the administrators themselves have expressly recognized the dangers inherent in the use of such confidential information by amending the regulations to forbid the use of such information unless "the Commissioner has determined that it is in the interests of national security and safety to do so" (8 C. F. R. 242.17(c), effective November 6, 1956).[7] Immediately upon the issuance of this regulation restricting the use of confidential information appellant's counsel on November 13, 1956 wrote the Solicitor General of the United States suggesting that this appeal should not proceed but should be withdrawn upon the grant of a further administrative hearing under the new regulation. On December 26, 1956 the United States Attorney replied that it was the view of the Department of Justice that the case should not be considered further administratively but that this appeal should be defended.

Finally on this point it need not be elaborated that the courts will not extend by implication the right of administrative officers to use confidential information in view of judicial experience concerning the dangers inherent in the use of information not subject to the tests of confrontation and cross-examination.

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7 The Commissioner of Immigration and Naturalization announced in connection with the new regulation (New York Times, November 1, 1956):

> "Under the new regulation, hearing officers will not be permitted to consider or rely on information undisclosed to the alien unless the Commissioner has personally reviewed the case and has satisfied himself that every effort to develop evidence through Service investigation and investigation by other Governmental agencies has been exhausted, and that the information is of sufficient importance to the nation's safety or security as to require its submission to the hearing officer."

B. *The Administrative Procedure Act applies and forbids use of confidential information.*

The appellant contends that §§5, 7, 8 and 10 of the Administrative Procedure Act of 1946, hereinafter called the 1946 Act, apply to hearings under §6 of the 1953 Act and prohibit use of confidential information. It is true that Congress nullified the holding of *Sung* v. *McGrath*, 339 U. S. 33, that §§5 and 11 of the 1946 Act were applicable to deportation proceedings. *Supplemental Appropriation Act*, 1951, 64 Stat. 1004, 1048; §242(b) of the 1952 Act (8 U. S. C. 1252). Section 242(b) provides in part: "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." Congress left undisturbed the application of §10 of the 1946 Act (5 U. S. C. 1009) providing for judicial review of administrative orders including deportation orders. *Shaughnessy* v. *Pedreiro*, 349 U. S. 49; *Brownell* v. *Tom We Shung*, 352 U. S. 180.

The absence in the 1953 Act of an express provision, similar to the quoted provision of §242(b) of the 1952 Act, makes applicable §§5, 7 and 8 of the 1946 Act, as well as §10, to administrative hearings to determine eligibility for permanent residence under §6 of the 1953 Act. Section 12 of the 1946 Act (5 U. S. C. 1011) expressly provides: "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." In view of Congressional policy expressed in this provision and judicial policy favoring application of the remedial legislation of the 1946 Act, expressed in *Sung* v. *McGrath, supra*, it is submitted that the 1946 Act must be applied to the administrative hearing here involved in the absence of express exemption in the 1953 Act. *Fong Sen* v. *U. S. Immigration and Naturalization Service*, 137 F. Supp. 236 (E. D. La.),

aff'd 234 F. 2d 656 (C. A. 5); cf. *Cheng Fu Shen* v. *Barber*, 144 F. Supp. 913 (N. D. Cal.).

Section 7(c) of the 1946 Act (5 U. S. C. 1006) expressly provides in part: "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Section 7(d) provides in part: "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the *exclusive record* for decision in accordance with section 8 of this Act * * *" (emphasis supplied). Section 10(e) (5 U. S. C. 1009) provides in part that the reviewing court shall hold unlawful and set aside agency action found to be unlawful, unconstitutional and also unsupported by substantial evidence in any case subject to the requirements of §§7 and 8 of the Act or otherwise reviewed on the record of any agency hearing provided by statute.

Appellant submits that the use of confidential information, even though its "broad nature" was disclosed, rendered the hearing invalid under the 1946 Act.

C. *The use of confidential information denied appellant due process of law.*

If it be determined that Congress impliedly authorized the use of confidential information in this case appellant submits that it denied him due process of law to which, as a resident in the United States since 1939, he is entitled. *Chew* v. *Colding*, *supra*. Congress has approved use of confidential information, even where excluded aliens seeking admission are concerned, only in cases in which the Attorney General "after consultation with the appropriate security agencies of the Government" concludes that its disclosure would be prejudicial to the public interest.

Section 235(c) of the 1952 Act. The regulations also place such a limitation on its use as noted in *Jay* v. *Boyd, supra.* The appellant submits that its use in this case without a determination by the Attorney General, or at least by the Commissioner, that its disclosure would be prejudicial to the public interest is so unreasonable as to be a violation of due process of law. The constitutional right of the alien to a fair hearing and a fair opportunity to establish his eligibility under §6 of the 1953 Act should be limited if at all by confidential information only where a most compelling reason for its use is given. No such reason has been given and certainly the nature of the confidential information as disclosed supplies no such reason.

Disclosure of the broad nature of the confidential information does not cure the constitutional defect of its use because such disclosure does not give the appellant the necessary opportunity to examine and explain the specific evidence upon which the broad charges are based and does not give the appellant an opportunity to convince the administrative officer on the facts.

CONCLUSION

It is respectfully submitted that upon the evidence adduced at the administrative hearing before the Special Inquiry Officer the appellant has established his right to relief under the Refugee Relief Act of 1953 and the Court should direct respondent to grant appellant's application for adjustment of his status to permanent residence.

In the alternative if the Court determines that the record does not clearly establish appellant's right to relief under the Refugee Relief Act, it should remand the case to respondent for a further hearing and decision which should not be based in any respect on secret and confidential information.

Respectfully submitted,

EDWARD J. ENNIS
BENJAMIN GIM
Attorneys for Petitioner-Appellant

CLIFFORD FORSTER
of Counsel

Docket Entries

June 30—55	Filed Petition
July 1—55	Filed affdvt. and order for service by an individual.
July 12—55	Filed stip. & order substituting atty for petitioner.
July 12—55	Filed amended petition.
July 21—55	Filed further amended petition.
Aug. 3—55	Filed summons & copy of petition.
Aug. 25—55	Filed affdvt & notice of cross motion to dismiss—ret. 8-30-55.
Oct. 4—55	Filed Opinion #22,161. Pet'r's application for relief remand for hearing; request to temporary inj. granted; etc.—Settle, order —Noonan, J.—(See opinion).
July 5—55	Filed affdvt & show cause order—stay respondent, etc.—(see opinion, Noonan, J. 10-4-55).
Dec. 5—55	Filed order denying motion to dismiss; pet'n for temporary restraining order granted, etc.—Noonan, J.—Mailed notice of entry 12-6-55.
June 6—56	Filed Affdvt & Notice of motion for Review, etc. Ret. 6-12-56.
July 19—56	Filed Notice of Motion to dismiss and summary judgt.—Ret. 7-31-56
Oct. 23—56	Filed opinion #22985 denying petition and motion for summary judgment will be granted. Settle order. McGohey, J.

Docket Entries

Oct. 23—56	Filed Pltf's brief.
Nov. 2—56	Filed Stip & Order of substitution for atty of Pltff.
Nov. 5—56	Filed stip. & order staying deportation pending appeal—Herlands, J.
Nov. 5—56	Filed stip. & order—pltff to deposit $1,000 pending appeal—etc.—Herlands, J.—($1,000 dep. in Reg. a/c #1 by Cha'o Li Chi.)
Nov. 7—56	Filed order & summary judgment in favor of deft against pltff. McGohey, J. Mailed notice of entry 11-8-56.
Nov. 14—56	Filed notice of appeal by pet'r. Mailed copy to U. S. Atty 11-16-56

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Opinion of September 30, 1955 Remanding Case for a Further Hearing

NOONAN, *D.J.*:

The petitioner in this action seeks by this motion to stay his deportation until the court has decided his case on the merits, and the government has cross-moved to dismiss the petitioner's petition on the ground that the petition fails to state a claim upon which relief may be granted. In

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view of the papers filed herein extraneous to the pleadings, this motion is treated as one for summary judgment.

If the government's motion should be denied, the petitioner's motion should be granted; and if the government's motion should be granted the petitioner's motion will become moot. Since the basic facts are not in dispute, this case is amenable to disposition by summary judgment.

We turn therefore to the merits of the government's motion and hence to those of the petition as finally amended.

The petitioner herein seeks judicial relief by way of a review of immigration proceedings, a temporary injunction and certain other relief. One of the proceedings has resulted in an administrative decision to deny suspension of deportation, which decision was based on a conclusion that the petitioner is not a person who, on deportation, would be subject in the country to which he is to be deported, to physical persecution [8 U. S. C. Section 1253 (h)]; the other administrative proceeding has resulted in a determination denying the adjustment of the petitioner's immigration status, which adjustment may be based on the ground of fear of persecution if the alien is forced to return to the country of his nationality and if the alien is otherwise qualified. [50 U. S. C. App. Section 1971 (d)].

The petitioner contends that he was denied procedural due process in each of these two administrative determina-

tions because of the use of certain confidential and secret

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information not known to the petitioner, and, he asserts because the determination was not based on "reasonable, substantial and probative evidence."

Furthermore in the latter administrative proceeding, the petitioner asserts that the agency improperly and unconstitutionally applied to the petitioner herein the restrictions specified in section 1182 (a) (27) of Title 8, U. S. Code.

The petitioner is a native and citizen of China who entered this country legally as a non-immigrant in 1939 as a member of the family of a duly accredited Chinese diplomat. As such, the petitioner's status was dependent upon the continuance of his father's status.

In 1946, the father's status terminated and he (the father) returned to the Chinese mainland with the rest of his family, not including the petitioner who decided to remain here. From that time on, his (the petitioner's) status has been that of an alien unlawfully in this country and subject to deportation.

Upon the commencement of deportation proceedings against him, the petitioner applied for discretionary relief from deportation pursuant to the provisions of what was then 8 U. S. C. Section 155 (c), which provisions are now largely covered by 8 U. S. C., Section 1254 (a) (1). The relief sought at that time was either suspension of deportation or voluntary departure, and, after a hearing, both were denied and deportation ordered by the hearing officer in his decision dated December 14, 1952. From this decision

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and order, the petitioner did not appeal administratively.

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Following the above decision and order, and the issuance of a warrant of arrest for purposes of deportation, the petitioner applied for discretionary relief pursuant to the provisions of Section 6 of the Refugee Relief Act on the ground of fear of persecution if deported to China. [50 U. S. C. App. Sec. 1971 (d)].

He also applied for a stay of deportation pursuant to the provisions of section 243 (h) of the Immigration and Nationality Act of 1952 [8 U. S. C. Section 1253 (h)] on the ground that he would be subject to physical persecution if deported to China.

After hearings on these questions in both of these last two administrative proceedings, the Immigration and Naturalization Service of the Department of Justice, basing its decision in part upon "confidential and secret information" not disclosed to the petitioner, denied his applications.

There is no question that the relief sought was purely discretionary, and the petitioner cannot hope to succeed without establishing either a clear abuse or an absence of discretion (*U. S. ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489). He asserts that the use of "confidential and secret" information in the proceeding, and/or the application to him of the standards set out in 8 U. S. C. Section 1182 (a) (27) indicate such an abuse of, or failure to use, discretion. This, then, is the ultimate issue for determination.

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In determining this question, we look first to the right of an alien facing deportation to procedural due process.

That a resident alien has a right to procedural due process is firmly established (*Kwong Hai Chew* v. *Colding*, 344 U. S. 590). A leading case on this subject is *Shaughnessy* v. *Mezei*, 345 U. S. 206, decided March 16, 1953, in which

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Mr. Justice Clark, in delivering the opinion of the court, upheld the right of the Attorney General to exclude "on the basis of information of a confidential nature" a resident alien of the United States who had left this country to travel abroad. In so holding, however, the opinion distinguished between an alien being excluded and one being deported. The first sentences on page 212 read as follows:

> "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. • • • (citing cases) • • • But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned'."

Thus the question is narrowed by virtue of the fact that the petitioner herein is a resident alien being deported rather than excluded.

In considering the propriety of using "secret and confidential" information against a resident alien in a deportation proceeding, we cannot ignore the case of *U. S. ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392. In that case, the United States Court of Appeals for this circuit specifically stated (p. 394):

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> "• • • we think it clear that use by the Commissioner of confidential information undisclosed to the appellant would not be in violation of procedural due process."

Thus, as to the petitioner's objection to the use of such information in his hearing pursuant to Section 243 (h) of

the Immigration and Nationality Act, the Dolenz case presents an insurmountable barrier to his success.

The hearing under Section 6 of the Refugee Relief Act, presents a different statutory problem. In this proceeding it is the alien's burden to establish that he is unable to return to the country of his nationality because of fear of persecution. And, unlike the provisions of the Immigration and Nationality Act in which it is the "opinion" of the Attorney General that determines the alien's future, this Act requires that the fear of persecution being established, the Attorney General, "upon consideration of all the facts and circumstances of the case", is to determine whether the alien is barred by any non-quota provision of the Immigration and Nationality Act.

The wording of the administrative decision in the Section 6 proceeding denies the petitioner's application not on the ground that he has no legitimate fear of persecution, but rather on the ground that he is not otherwise eligible according to the provisions of the Immigration and Nationality Act, and indicates that the secret and confidential information used did not go toward the decision on the question of fear of persecution, but rather that it affected that part of the proceeding referring to the provisions of

the Immigration and Nationality Act.

In view of the fact that the Attorney General is required by the Refugee Relief Act to make a determination based on all of the pertinent facts and circumstances, rather than merely to exercise his opinion on the matter, Congress must have intended that the alien should be informed of the nature of the information being used against him so that he might attempt to rebut it. How can a true deter-

mination be made without the issues being clear to both parties?

The government makes much of the change in the wording of the Immigration and Nationality Act which makes the administrative relief contingent on the *opinion* of the Attorney General. Such being the case, the subsequent wording of the Refugee Relief Act requiring the Attorney General's *determination* should be equally significant.

Accordingly, therefore, it is the opinion of this court that the petitioner herein was denied due process of law in the hearing held pursuant to the provisions of the Refugee Relief Act of 1953 as amended by reason of his not being informed of the nature of the confidential information against him.

Therefore, his petition does state a claim upon which relief can and should be granted.

Turning now to the constitutionality of applying to the petitioner in a Refugee Relief Act proceeding the restrictive provisions of Title 8 U. S. C. Section 1182 (a) (27) which, it is clear, were incorporated by the hearing officer,

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we note that this section specifies certain excludable classes of aliens. Petitioner argues that the phrase "prejudicial to the public interest" is too vague and indefinite to be validly applied to a resident alien.

Although a resident alien may have more procedural rights than an alien seeking entry, the standards of fitness set by Congress regarding fitness to remain in this country need not be different. We do not find the wording "public interest" to be so vague and indefinite as to be unconstitutional as applicable to this case.

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Accordingly, this court is disposed to grant the following relief to the petitioner:

(1) The petitioner's application for relief under the terms of the Refugee Relief Act is remanded to the appropriate hearing officer in the Immigration and Naturalization Service for a hearing consistent with the ruling of this court that the petitioner is entitled to know the broad nature of the "secret and confidential" information being used against him;

(2) The petitioner's request for a temporary injunction is granted, enjoining the respondent herein from executing the outstanding order of deportation pending the final decision on the rehearing referred to in the preceding section; and

(3) The previous decisions of the Immigration and Naturalization Service officials based on the use of secret and confidential information on the Refugee Relief Act pro-

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ceeding are declared null and void.

Settle an order in accordance with the above opinion.

Dated, New York, N. Y.
September 30, 1955

GREGORY F. NOONAN
U.S.D.J.

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Order of December 2, 1955 Remanding Case

The plaintiff-petitioner above-named having, by notice of motion dated July 1, 1955, moved this Court for an order staying the enforcement of an order of deportation outstanding against said plaintiff-petitioner, pending the hearing and determination of the above-entitled action, and the defendant-respondent having, by notice of motion bearing the filing date of August 25, 1955, cross-moved to dismiss the petition on the merits, and said motions having duly come on to be heard before this Court on September 6, 1955, and counsel having been heard, and due deliberation having been had thereon, and the Court having thereafter, on October 4, 1955, filed its opinion dated September 30, 1955, it is now, on motion of Stanley Law Sabel, Esq., attorney for plaintiff-petitioner,

ORDERED, that the motion by the defendant-respondent to dismiss the complaint be, and hereby is, denied; and it is

FURTHER ORDERED, that the plaintiff-petitioner's motion for a temporary injunction restraining the defendant from deporting plaintiff or taking him into custody for deportation, pending the final disposition of this suit, be, and hereby

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is, granted; and it is

FURTHER ORDERED, that the plaintiff-petitioner's application for relief under the terms of the Refugee Relief Act be, and hereby is, remanded to an appropriate Hearing Officer in the Immigration and Naturalization Service for a hearing consistent with the rulings and instructions of this Court as contained in its opinion dated September 30, 1955, and filed October 4, 1955; and it is

Order of December 2, 1955 Remanding Case

FURTHER ORDERED, that pending such hearing and the determination thereof, and a filing in this Court of a report of such determination, jurisdiction of the petition in this case is retained by this Court, and the plaintiff-petitioner may, if so advised, file such supplemental and amended pleadings as are necessary for a review of the aforesaid determination, within twenty days from the date such determination is made; and it is

FURTHER ORDERED, that the time within which the defendant-respondent may answer, or make further motions regarding, the petition be, and hereby is, extended for a period of twenty days from the date of the aforementioned determination of plaintiff-petitioner's administrative rehearing under the Refugee Relief Act; or if a supplemental or amended pleading is filed by plaintiff-petitioner, for a period of twenty days from the service of such supplemental

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or amended pleading.

Dated: New York, N. Y., December 2, 1955.

GREGORY F. NOONAN
United States District Judge

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Opinion of October 23, 1956, Granting Appellee's Motion for Summary Judgment

McGOHEY, *D.J.*:

The petitioner is a deportable alien who sought adjustment of his status under Sec. 6 of the Refugee Relief Act of 1953,[1] on the claim that if returned to China he would be subjected to persecution. The Attorney General determined that the petitioner failed to establish his claim and denied adjustment of his status. The petitioner now seeks to have the Attorney General's determination set aside on the ground that it lacks support in the evidence on which it purports to be based and is arbitrary.

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The Government moves for a summary judgment.

In a similar proceeding brought by the petitioner in September 1955, he raised the same issues now presented and others. The latter were decided against him by Judge Noonan and are not before me. Judge Noonan held that, on the alien's claim for adjustment of his status on the ground of possible persecution if returned to China, procedural due process required that he be informed of the nature of the "secret and confidential" information which was used so that he might have the opportunity to rebut it. It was conceded that he had then not been so informed. Judge Noonan stayed his deportation and remanded the petitioner's application for adjustment of status pursuant to Sec. 6 of the Refugee Relief Act, "to the appropriate hearing officer . . . for a hearing consistent with the ruling of this court that the petitioner is entitled to know the broad nature of the 'secret and confidential' information being used against him."

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1 50 U. S. C. A. App. 1971 (d).

Opinion of October 23, 1956, Granting Appellee's Motion for Summary Judgment

In obedience to that direction, the petitioner was accorded a second hearing on March 27th, 1956 by a Special Inquiry Officer of the Immigration and Naturalization Service. The petitioner was accompanied by his counsel. The broad nature and the purport of the secret and confidential information were disclosed by the examiner under six categories. Petitioner's counsel then examined him in detail and the petitioner denied the matters in each specification. He admitted that he had favored the Communist regime

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when it first assumed power in China, but asserted that he had later come to disapprove of it. He asserted that he does not "agree with Communism in principle;" that he fears persecution and imprisonment if he is returned to China because it would mean "doing exactly what is assigned to me"; that he could not work for the Chinese Communist Government as a professional entertainer (he is a dancer) because he doesn't "believe in the goals, the exhortation (sic) of the Communist Government"; and that "as a cultural worker more than as a technician I can only work if I believe in what I am doing."

In an opinion dated April 10th, 1956, which was approved by the Acting Regional Commissioner on May 9th, 1956, the Special Inquiry Officer concluded and recommended as follows:

> "Despite the applicant's categorical denial of the allegations contained in the confidential and secret information, the broad and general nature of which was disclosed to the applicant, it is concluded that he has failed to establish that he has reasonable grounds on which to fear persecution upon his return to China,

and his application for adjustment of status should be denied on that ground.

> "Recommendation: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953 be denied for the reason that the applicant has not established that he has reasonable grounds to fear persecution upon his return to China because of his 'political opinion.'"

The Attorney General, on the basis of the foregoing, denied the petitioner's application for adjustment of his immigra-

tion status. The petitioner concedes that he has the burden of establishing that he has reasonable grounds to fear persecution because of his political beliefs if he is returned to China. His contention here is that he has sustained that burden; and that the Attorney General's contrary determination lacks sufficient and indeed any support in the evidence on which it purports to be based.

I do not agree. Congress has vested the Attorney General with wide discretion in immigration matters and "the scope of judicial review is clearly circumscribed."[2] Indeed, "the very nature of the decision (the Attorney General) must make concerning what a foreign country is likely to do is a political issue into which the courts should

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[2] *U. S. ex rel. Moon* v. *Shaughnessy*, 2C. 218 F. 2d 316-318.

Opinion of October 23, 1956, Granting Appellee's Motion for Summary Judgment

not intrude."[3] To be sure, the Attorney General may not capriciously disregard the evidence consisting of the petitioner's denials or draw irrational inferences from such evidence. But, neither is he obliged to accept those mere denials at full value when they conflict with other evidence. Questions of weight and credibility were for the Attorney General, not this Court, to pass on. See *U. S. ex rel. Femina* v. *Curran.*[4] On this record it cannot be said that he acted capriciously, arbitrarily or unfairly in concluding that the petitioner has failed to sustain his burden of estab-

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lishing reasonable grounds for his asserted fear of persecution if returned to China.

Accordingly the petition will be denied and the motion for summary judgment be granted.

Settle order.

JOHN F. X. MCGOHEY
U.S.D.J.

Dated: New York, New York. October 23rd, 1956

3 *U. S. ex rel. Dolenz* v. *Shaughnessy*, 2C. 206 F. 2d 392-395.

4 2C. 12 F. 2d 639, 640.

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Order of November 7, 1956 Granting Summary Judgment

This cause having come on to be heard on the defendant-respondent's motion for summary judgment and the opinion of the Court granting the motion having been filed on October 23, 1956, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendant-respondent's motion for summary judgment be and the same hereby is granted and the petition be and the same hereby is denied.

Dated: November 7, 1956

JOHN F. X. MCGOHEY
U.S.D.J.

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Decision of Special Inquiry Officer

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File No: A 7 037 142

Serial number: 3480

NO APPEAL
New York, N.Y.

APR 10 1956

In re: CHI CHAO LI or
CHI CH'AO-PIEH

PROCEEDINGS UNDER SECTION 6 OF THE REFUGEE RELIEF ACT OF 1953

IN BEHALF OF APPLICANT: Marvin Neuman, Esq.
1776 Broadway
New York, New York

APPLICATION: Adjustment of immigration status

The applicant is a 29 year old single male alien, a native and citizen of China. He last entered the United States on February 3, 1939 at the port of New York aboard the Steamship Aquitania at which time he was admitted under Section 3(1) of the Immigration Act of 1924 as a member of the immediate family of an accredited government official. The applicant has testified that he is unable to return to China, which is the country of his birth, nationality and last residence because of a fear of persecution, that country being Communist dominated.

On June 16, 1955 the Acting Regional Commissioner at Burlington, Vermont approved a recommendation of the Special Inquiry Officer that the application for adjustment of status be denied on the ground that the applicant

was presently inadmissible to the United States under the provisions of Section 212(a)(27) of the Immigration and Nationality Act and thereby ineligible for adjustment of status pursuant to Section 6 of the Refugee Relief Act. In an action for review of the proceedings and summary judgment in the United States District Court for the Southern District of New York, the Court, on December 2, 1955 ordered the case remanded to a hearing officer of the Immigration and Naturalization Service and declared that the conclusion holding the applicant inadmissible to the United States under Section 212(a)(27) of the Immigration and Nationality Act where such conclusion was based on confidential and secret information not disclosed to the applicant, was improper. The applicant was reexamined on March 27, 1956 at which time as ordered by the United States District Court the broad nature of the allegations contained in the confidential and secret information

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concerning the applicant were disclosed to him. The applicant thereupon made a categorical denial of each and all such allegations which indicate that he is in sympathy with the Communist movement of China; that he has approved certain programs of the de facto Communist government of China; that members of his immediate family are in accord with or actively participating in the Communist movement in China or that the applicant has participated in activities since his entry into the United States which were in sympathy with such Communist movement in China. The applicant did however admit that during the early days of the Communist regime in China, he was in sympathy with that movement believing that the movement was for the betterment of the average Chinese people. He now states that because of subsequent events, he has changed

his mind and has become anti-Communist in political opinion.

Despite the applicant's categorical denial of the allegations contained in the confidential and secret information, the broad and general nature of which was disclosed to the applicant, it is concluded that he has failed to establish that he has reasonable grounds on which to fear persecution because of his political opinion should he return to China, and his application for adjustment of status should be denied on that ground.

RECOMMENDATION: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953 be denied for the reason that the applicant has not established that he has reasonable grounds to fear persecution upon his return to China because of his political opinion.

(Signed) LENNOX F. KANZLER
Lennox F. Kanzler
Special Inquiry Officer

LFK:mn

Upon consideration of the entire record, including the exceptions filed, we find that the exceptions are without merit and that the application should be denied.

SO ORDERED

(Signed) LELAND W. WILLIAMS
Acting Regional Commissioner

May 9 1956

Hearing Before Special Inquiry Officer on March 27, 1956

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

SWORN STATEMENT

In Proceedings under Section 6
of the Refugee Relief Act of 1953
in the case of

CH'AO LI CHI
a/k/a CH'AO PIEH CHI

Applicant

File: A-7 037 142

Serial: 003480

Special Inquiry Officer: Lennox F. Kanzler

Stenographer: Elsa B. Tauriello

Language: English

Date: March 27, 1956

Place: 70 Columbus Avenue
New York, New York

Counsel: Marvin Neuman, Esq.
1776 Broadway
New York, New York

Special Inquiry Officer to Applicant:

Q. Do you speak and understand the English language?
A. Yes, I do.

Examination of Chi Ch'ao Li

Q. What is your full, true and correct name? A. CH'AO LI CHI.

Q. Which of these is your family name? A. CHI.

Q. Then according to Chinese custom would your name be CHI CH'AO LI? A. That is correct.

Q. What is your present residence address? A. 225 East 10th Street, New York 3, N. Y.

Q. Are you the same Chi Ch'ao Li or Chi Ch'ao-Pieh who was examined before me in this office on May 5, 1955 on your application for adjustment of status under Section 6 of the Refugee Relief Act of 1953? A. Yes, I am.

Q. Your case has again been referred to me for further hearing on the basis of an order entered on December 2, 1955 by a United States District Judge, the Southern District of New York, which order of the court, together with the

opinion of the court dated September 30, 1955, I will mark as an exhibit and attach to the record in this case. You have been called into this office today for that purpose. Do you understand? A. Yes, I do.

Special Inquiry Officer to Counsel: Mr. Neuman, as I understand it, you are now counsel of record in this case. Is that correct?

By Counsel: Yes, sir.

By Special Inquiry Officer: Are you ready to proceed with this hearing?

By Counsel: Yes, sir.

Special Inquiry Officer to Applicant:

Q. Will you now stand and raise your right hand. Do you solemnly swear that all of the evidence you are about to give in this case will be the truth, the whole truth and nothing but the truth so help you God? A. I do.

Examination of Chi Ch'ao Li

By Special Inquiry Officer: Sit down, please.

Special Inquiry Officer to Counsel: Now, Mr. Neuman, would you like to proceed with any presentation of evidence or interrogation of this applicant in support of his application?

By Counsel: Yes, sir. But before doing so may I ask whether this is a hearing de novo conducted under the auspices of the District Court of the United States or what is the general nature of these proceedings?

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By Special Inquiry Officer: This is not a hearing within the definition of what we normally consider a hearing to be in deportation proceedings. The regulations provide that an applicant for adjustment of status under Section 6 of the Refugee Relief Act of 1953 shall be examined on his application. This was done by me on May 5, 1955. At that time a sworn statement of this applicant in support of his application was made, at which time I propounded certain questions to which the applicant under oath responded. A record of that sworn testimony was also attached to his application as EXHIBIT U. I believe you have a copy of that record in front of you. We are today proceeding on order of the Southern District Court of New York and I note in the court's order the case is remanded to an appropriate hearing officer for a hearing consistent with the rulings and instructions of the court's opinion dated September 30, 1955. I cannot, of course, concede that the court has reference to any hearing not in conformity with the regulations promulgated under the Refugee Relief Act of 1953 and, accordingly, we will proceed with the taking of this testimony,

the record of which will be made a part of this record as an exhibit.

By Counsel: Mr. Kanzler, is it your intention to divulge to the applicant the broad nature of the secret and confidential information being used against him, and I am now quoting from the opinion of his Honor, Judge Noonan, which appears on page #8 of said opinion dated September 30, 1955?

By Special Inquiry Officer: Yes. The broad nature of the adverse information in the possession of this Service and which is classified as restricted or secret not only can be but, in my opinion, has been revealed to this applicant at the time of his examination on May 5, 1955. The specific information classified as confidential or secret cannot be disclosed to the applicant or to any other person by me. As to the broad nature of such information, you certainly will be apprized of it and given an opportunity to defend against it or to offer any material evidence refuting it.

By Counsel: May I ask for the divulgence at this time of the information which you contemplate furnishing.

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By Special Inquiry Officer: First, it is indicated that this applicant is not as anti-communistic in political opinion as would appear from his application for adjustment of status because of his very close relationship with his half-brother, Chi Chao Ting, who in the past is reported as having been active in the communist cause. Also, because of his close relationship with his father, Mr. K. C. Chi, who, it is reported, was a former editor of the China Daily News published in the city of New York,

Examination of Chi Ch'ao Li

which paper is popularly known as the Chinese communist publication in New York City, and who is reported to have returned to the mainland of China to accept a post at Peiping University under the sponsorship of the Chinese People's Republic.

Secondly, because of this applicant's own testimony to the effect that in the early days of the communist coup in China he was favorably impressed with such activity.

Third, because of his reported activity in behalf of the Chinese Students Christian Association which in 1949 was reported to have been led by pro-communist persons, at which time the applicant is reported to have upheld communism as being better than the capitalist system.

Fourth, the applicant's reported participation in a communist inspired brotherhood festival conducted at the People's Drama Theatre, 812 Eldridge Street, New York, at three p.m. Sunday afternoon, February 11, 1951.

Fifth, the applicant's close association with persons other than his immediate family reported to be active in communist activities in the United States, specifically, one Kee Min Ta.

Sixth, the applicant's reported membership in the American Youth for Democracy, an organization also reported as active in communist affairs.

This generally is the broad nature of the secret and confidential information concerning this applicant. Do you now wish to proceed?

By Counsel: Mr. Kanzler, may I say that your statement of the broad nature of the information being used against the applicant appears by innuendo in the preceding sworn statement taken of him on

May 5, 1955 which has already been made a part of the record. In other words, we have not been furnished with any information today different than

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what is contained in that testimony. Therefore, may I ask you to define some of the accusations, and I will be specific in my request.

I would like to know the evidence upon which lies the basis of the charge of a "very close relationship with his half-brother." I believe that Mr. Chi is entitled to know the evidence on which the charge is made that his father returned to China to accept a post under the sponsorship of the Chinese People's Republic. I would like to know what his reported activities in behalf of the Chinese Students Christian Association consisted of and, if possible, the name of the informant. I would like to know the time and the place and the occasion in which the applicant is reported to have upheld communism as being better than the capitalist system. I would like to know the nature of the information concerning the applicant's close relationship with Kee Min Ta and the basis for the report that said Kee Min Ta was active in communist activities in the United States. And, finally, the basis of the reported membership in the American Youth for Democracy.

My questions actually amount to my asking for an offer or proof in this matter or for my asking whether the government intends to introduce any probative evidence in support of these various charges.

By Special Inquiry Officer: Except for my prior statement outlining the broad nature of the information contained in the confidential reports, I am not

permitted to disclose anything further, specifically as to the nature of the evidence. Nor does the government intend to offer any additional evidence in this matter.

By Counsel: Before proceeding, Mr. Kanzler, may I ask whether this will be a hearing de novo or whether this will be considered as an application de novo to be heard on its merits.

By Special Inquiry Officer: I think I previously answered that by telling you that this is not a proceeding de novo. I construe the order of the United States District Court to be permitting this applicant a furtherance of the proceedings arising under Section 6 of the Refugee Relief Act. I have disclosed to him the broad nature of the information which may be considered derogatory and I now afford him an opportunity to offer any material evidence in support of his application or to refute any of the information or allegations previously referred to.

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By Counsel: Do I understand then that the government does not intend to introduce any witnesses or any evidence whatsoever at this time?

By Special Inquiry Officer: That is correct.

Counsel to Applicant:

Q. Mr. Chi, you have heard the hearing officer give the broad outlines of the information which is contained in their secret and confidential file. Before proceeding with the merit of your application, I would like to examine you in detail upon each of these allegations. First, you seem to be charged with a very close relationship with a half-brother of yours, Chi Chao-ting. How much of an age

differer ? is there between you and this half-brother? A. He is 24 years older than I and he left China before I was born.

Q. How old are you now? A. I am now 28.

Q. In the 28 years of your life, how much time would you estimate that you were physically resident with your half-brother, sharing a common roof? A. I cannot say exactly, but the only definite period that we shared anything like a common roof was while we were coming from China to this country, en route.

Q. Was there any period of time amounting to three months or more from the time that you reached the age of fifteen to the present that you did share living quarters with your brother? A. No. At no time.

Q. From the age of fifteen to the present time, almost thirteen years, you have never spent as much as three months in the same household with your half-brother? A. I would push the age back further. From the time we arrived in this country to the present, I have never done that.

Q. Remember that it has been reported that you enjoy a very close relationship with your half-brother. Would you say that your relationship with him was a very close one? A. I would not say so.

Q. Is your brother a member of a communist party anywhere in the world? A. So I understand.

Q. Did your half brother ever attempt to influence your political thinking? A. I was too young when I was with him at all and later on I very rarely saw him.

Q. When was the last time that you actually saw him face to face? A. When he came to this country with Dr. H. H. Kung to the Breton Woods Conference.

Q. Was your half-brother then a communist or was he then an official of the Chinese Nationalist Government?

A. He was then an official of the Chinese Nationalist Government.

Q. Do you have any knowledge as to when your half-brother became a communist? A. That I have no definite knowledge. I understand, from what I have been told, that he has been active a long time ago, of which I would have no knowledge.

Q. Were any of your half-brother's friends also your friends or associates? A. No, because they all belonged to the older generation.

Q. Would you say that there is any basis in fact for an accusation that you had or have a very close relationship with your half-brother? A. No, except for the accident of family relationship.

Q. The charge was also made that you enjoy a very close relationship with your father, Mr. K. C. Chi. You did share the same roof with your father, did you not? A. Yes, and we shared many other things.

Q. From when to when did you live with your father? A. From, well, I have lived with him all the time up till the time he went back to China.

Q. When was that? A. In 1946.

Q. That was more than two years before the Chinese communist taking of power? A. Yes.

Q. Up to 1946, did your father express any political opin-

ions to you? A. Yes. He was actively pro-President Roosevelt and when I said before that we have shared many things together, I mean such things as study of the old Chinese classics and also some translation work, of which included our complete collection of the speeches of Roosevelt.

Q. The Chinese communist movement got under way in

China some time early in 1920, did it not? A. So I understand.

Q. And the Chinese communists broke with the Chinese Nationalists in 1927. Is that information correct? A. I don't really know much about it.

Q. Referring to the period of time from 1927 to 1946, when the Chinese communist armies were isolated in the northwest regions of China, did your father express any pro-communist views to you? A. The early period I would not know since I was born only in 1927 and for as long as I can remember until 1946 my father was a member of the Chinese Nationalist Party and was an official of the Nationalist Government.

Q. When your father returned to China in 1946, did he return as an official of the Chinese Nationalist Government? A. As I recall the situation, his official capacity had terminated as a special investigator of American legal systems or something like that. He went back in 1946 when Dr. Hu Shih, who was the former Ambassador to the United States under the Nationalist Government, was the president of Peking University, and it was at Dr. Hu Shih's invitation that my father went back to Peking University.

Q. At that time Peking University was being operated under the auspices of the Chinese Nationalist Government? A. Yes.

Q. Not the Chinese Communist Government. A. Yes.

Q. And your father returned to a post under the Chinese Nationalist Government. Is that correct? A. That is correct.

Q. I believe you have testified before that your father continued as a teacher at Peking University until a year or so after the Chinese communist armies overran Peiping. Is that right? A. Yes, that is correct.

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Q. When was the last time you received a letter from your father? A. I have received no communication from him since the occupation, since the change.

Q. You have received no letter from your father since 1948 or 1949? A. That is true. I have received letters from my mother but not from him.

Q. Have any of the letters from your mother mentioned your father's occupation or profession or residence or any other details? A. No. Merely said, "Your father is well."

Q. Do you know of your own knowledge whether your father is presently teaching at Peking University? A. No. He is no longer.

Q. I believe that you have been told that your father is still teaching at Peking University. A. I think the information is just that the case has gone on so long. The information is outdated.

Q. You do not believe that your father is now teaching at Peking University? A. No, because it is from mother's letters. I don't remember which year, but he has retired.

Q. Would your mother's letter indicate to you whether your father's retirement had been voluntary or involuntary? A. No. I would not know.

Q. What subject did your father teach at Peking University? A. He taught law and logic.

Q. The hearing officer advised you that your father is reported to have returned in 1946 to Peiping, China, "to accept a post under the sponsorship of the Chinese People's Republic." Would you say that that information or that report is correct or incorrect? A. That statement is not correct.

Q. Why would you say the statement is not correct? A. Because when he went back to China in 1946, it was not to

accept a post under the sponsorship of the Chinese People's Republic.

Q. It was, rather, to accept a post under the sponsorship of the Chinese Nationalist Government, was it not? A. And at the specific invitation of Dr. Hu Shih.

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Q. And has there ever been any indication that Dr. Hu Shih is pro-communist? A. No.

Q. Has your father given any indication that he is pro-communist? A. He has never given expression.

Q. The only way in which it could be said that your father is pro-communist is by reason of his having continued his profession as a teacher at the Peking College after its occupation by the Chinese communists? A. No. The other reason is that he was the first editor of the Chinese Daily News.

Q. When you say that your father was the first editor of the Chinese Daily News, to what year of editorship are you referring? A. It was the year 1940. He was invited by group of young Chinese to assume the editorship of the China Daily News as a senior scholar.

Q. The China Daily News is today known as a pro-communist newspaper, is it not? A. Yes, it is.

Q. In 1940, when your father took over the editorship, did it then express any pro-communist views, to the best of your knowledge? A. No.

Q. When you say that your father was a senior scholar, what do you mean, with particular reference to his work as editor of the China Daily News? A. Since the China Daily News is a Chinese language newspaper and the young Chinese are weak in that linguistic scholarship in the Chinese language, he literally edited manuscripts.

Q. Did your father write any news reports himself? Did he write any editorials himself? Did he do any creative

work with that newspaper or was he the editor in the technical sense of the term?

Special Inquiry Officer to Applicant: Before you answer that question, I want to advise you that your answer should be based on actual knowledge that you have of the subject:

By Applicant:

A. Then I say I don't know. At the time I was twelve.

Counsel to Applicant:

Q. In 1940 your father was an officer of the Chinese Nationalist Government as well as editor of the China Daily News. A. That is true.

Q. Were those two professions consistent or inconsistent, if you know? A. That is inconsistent.

Q. How long did your father continue to be editor of the China Daily News? A. Until he entered the Office of War Information in 1941 after Pearl Harbor.

Q. In other words, your father was associated with the China Daily News for just about a year or a little more than a year? A. Yes.

Q. Did he then sever his connection with that newspaper? A. Yes.

Q. He did no further work for the newspaper? A. Yes.

Q. If the China Daily News had been pro-communist as late as 1946 and if your father had been identified with that newspaper to that date, would your father have been invited by Dr. Hu Shih to teach at Peking University? A. No, he would not.

Q. Mr. Chi, I show you what appears to be a newspaper folded in an original mailing jacket and ask if you can iden-

tify this. A. Yes. It is a copy of the China Daily News addressed to Mr. K. C. Chi, who is my father, at my present address which was the family address.

Q. Your father lived at this address also before his departure for China? A. Yes.

Q. When did you receive this particular newspaper? A. I continue to receive it.

Q. You still receive this newspaper? A. Yes.

Q. Why do they continue to send this newspaper to you? A. It is not sent to me. It is sent to my father and father

had a life subscription by reason of his having been the first editor.

Q. Do you read this newspaper? A. No.

Q. What do you do with these issues which come to you? A. I dispose of them.

By Counsel: Mr. Hearing Officer, May I offer this newspaper for inclusion in the record, together with this mailing jacket.

Special Inquiry Officer to Counsel: At this point I'd like to advise you, Mr. Neuman, that the order of the court and the court's opinion were combined in evidence as Exhibit V in this proceeding; and this newspaper, together with its mailing jacket, is now identified as Exhibit W.

Counsel to Applicant:

Q. Mr. Chi, you have also been informed that your own testimony is to the effect that in the early days of the communist coup in China you were favorably impressed by that activity. Do you remember being charged with that? A. Yes, I do.

Examination of Chi Ch'ao Li

Q. I would like to discuss with you the early days of the Chinese coup and what it meant to you. The Chinese coup occurred during 1948 and was consolidated in 1949. Were you at that time in contact with other Chinese people? A. In 1948 and 1949? No, I was not.

Q. You read news dispatches of those years, did you not? A. Yes.

Q. News dispatches concerning the goings on in the mainland of China? A. Yes.

Q. What was your feeling about what was happening there? A. I was pleased with the land reforms which were professed.

Q. Were there other Chinese of your family background and social and economic background with whom you sometimes discussed the happenings in China? A. In 1948 I did not know any other Chinese.

Q. What about 1949 and 1950? A. In 1949 and 1950 Mr. Kee Min Ta became my roommate. That was in 1950.

Q. What was the general feeling of the Chinese in the United States about the happenings in China, if you remember? A. I don't remember because, except for Kee Min Ta who became my roommate, I have never associated with any Chinese ever since I have been in this country.

Q. Is it true that you were disaffected by the behavior of the Chinese Nationalist Government officers and other civilian employees of that government? A. I was dissatisfied with the Chiang Kai-shek rule at the time simply from what I hear in non-Chinese circles.

Q. What displeased you about Chiang Kai-shek's rule? A. About the corruption.

Q. Are you familiar with the Department of State white paper which gave the United States analysis of the regime of Chiang Kai-shek and which pointed out the differences

between Chiang Kai-shek's government and that of the Chinese communist government? A. Yes, I am familiar with that report.

Q. What did that report detail in so far as Chiang Kai-shek is concerned? A. Chiang Kai-shek's government was incompetent and corrupt.

Q. Did you believe what you read in the State Department white paper? A. Yes, I did.

Q. Was this one of the primary moving forces that created your impression and opinions? A. Yes.

Q. Did you have any personal knowledge of the bribery and corruption and graft and inefficiency of the Chiang Kai-shek government? A. No.

Q. But you were disaffected because of what you had read about them? A. Yes.

Q. Do you know whether the Chinese people living in the United States welcomed the Chinese communist government simply and solely because it was a change from the Nationalist government? A. I don't know for a fact because I have little contact with Chinese.

Q. Did you get any kind of an impression from your non-Chinese friends in this particular area? A. Yes.

Q. What impression did you gain from your conversations with your non-Chinese friends? A. The impression is that the change is a relief.

Q. Would any kind of a change have been a relief to the Chinese people? A. Yes.

Q. Do you still feel the same way about the change? A. No.

Q. Why not? A. Because the original promise turned out to be not what they had appeared.

Q. You mean that the promises which they had made were not fulfilled by the Chinese communist government? A.

Not only that but have turned into things which are much worse. Turned into terrorism and compulsion and regimentation.

Q. I call your attention to the front cover of Time Magazine for March 5, 1956 and to the story covering that edition beginning on page #27, and I ask if you have read this entire dispatch concerning Communist China. A. I have.

Q. Does the information contained herein come to you as any surprise or has this been actually occurring in your knowledge? A. It concerns my fears.

By Counsel: Mr. Hearing Officer, may I ask that this issue of Time Magazine be made a part of the record as an exhibit.

Special Inquiry Officer to Counsel: Mr. Neuman, the issue of Time Magazine presented by you is marked in evidence as Exhibit X.

Will you proceed.

Counsel to Applicant:

Q. In 1948 or 1949 or 1950, did you have any knowledge

of the terror as is set forth in the magazine which has just been marked Exhibit X? A. None.

Q. Does this article express your own repugnance and fear of such terror? A. Yes, it does.

Q. Mr. Chi, I would like to proceed to the third charge against you, namely, your reported activity in behalf of the Chinese Students Christian Association. Were you a member of that organization and if so, for how long and where? A. No. I was not a member of the association.

Q. Were you ever at any time a member of that organization? A. No, I was not.

Examination of Chi Ch'ao Li

Q. Did you ever at any time pay any dues to that organization? A. No, I have not.

Q. Have you ever given any performance under the auspices of that organization? A. I have danced with Kee Min Ta at a few functions but I would not know who they were for.

Q. To the best of your knowledge, you have never performed for this Chinese Students Christian Association? A. No.

Q. Do you have any information as to why you are "reported" to have been active in behalf of the Chinese Students Christian Association? A. It is possible that my younger brother was a member. I say it is possible because at that time he was away from home going to Harvard and I was not familiar with all his activities but he may have been active in the organization and his name would very easily be confused with mine.

Q. What is your younger brother's name? A. Chao-Chu Chi.

Q. Are there any phonetic readings of your brother's name which would make it similar to yours? A. His friends would often refer to him as Chao Chi.

Q. Were you ever referred to by the name of Chao Chi? A. Yes, also.

Q. How did you and your brother keep one another separated? A. When he is at home and I am at home, we ask, "Which one do you mean?"

Q. By the way, in 1949 were you at school or were you otherwise occupied? A. I cannot recall exactly at present. I believe I was full time at the New York University Summer School, which I could check with the attendance record there.

Q. You were informed that it was reported that you up-

held communism as being better than the capitalist system. Is that report true or untrue? A. It is untrue.

Q. Did you ever make any statement at any time at any place to any person in which you upheld communism as being better than the capitalist system? A. No.

Q. If there is such a report, could that report refer to you? A. No, it could not.

Q. Is it possible for the report to have referred to someone of a similar name? A. That is possible.

Q. There is no truth whatsoever in the remark that it is reported that you upheld communism as being better than the capitalist system? A. There is no truth.

Q. Do you believe at the present time that communism is better than capitalism? A. I do not.

Q. Have you ever believed that? A. No.

Q. And you have never voiced any such sentiment? A. No, I have not.

Q. Mr. Chi, the fourth allegation is your reported participation in a brotherhood festival. What brotherhood festival does this concern? A. I believe that it is a true reporting of fact. I did dance at the place.

Q. When you say "place" you mean the People's Drama Theatre, 812 Eldridge Street, New York City? A. I be-

lieve that is what the place is called.

Q. Is that the only time that you have appeared at that place for a performance? A. Yes, I am sure it was the only time because upon first mention I did not even recall the address. But I did dance there once for a fee and it was considered as a professional engagement. The nature of the affair I had no knowledge of.

Q. Did you contribute your services or were you paid a professional fee? A. I was paid a professional fee.

Examination of Chi Ch'ao Li

Q. Do you know whether that brotherhood festival which was conducted on February 11, 1951 bears any relationship to the brotherhood festival which presently is in effect at Wanamaker's at 8th Street and Astor Place? A. I don't know.

Q. At the time you gave your performance were you induced to do so by any political considerations? A. No.

Q. Were you aware that there were any political implications in the brotherhood festival? A. No.

Q. If you had known that there were political implications—if you had known, as is charged, that this festival was communist inspired, would you have performed? A. No.

Q. Why not? A. Because I don't believe in the cause.

Q. Not even if you are paid for it? A. Well, they don't pay enough to make me risk.

Q. You said that that was the only time you had appeared at that particular theatre. A. Yes.

Q. Have you appeared at any left wing functions in your capacity as entertainer, to the best of your knowledge? A. No.

Q. The fifth allegation concerning you pertains to your close association with persons other than your immediate

family, specifically, Kee Min Ta. Kee Min Ta was your roommate for a particular period, was he not? A. Yes.

Q. When was he your roommate and what were the circumstances of your association? A. He became my roommate, I think, in 1950 because he was the only male member of the Dance Department of the New York University School of Education.

Q. For how long was he your roommate? A. I think, until 1952 when I threw him out of the apartment.

Q. You had a personal dispute with Mr. Kee which re-

sulted in the breaking up of your living arrangements? A. Yes.

Q. Did your dispute have anything to do with politics? A. No. He threw out my cat.

Q. Was Mr. Kee active politically? A. I think he was.

Q. Was he a member of the Communist Party of the United States or of China? A. I don't know.

Q. But you do know that he was politically active? A. Yes.

Q. Did he attempt to influence your political thinking? A. Yes.

Q. In what ways? A. Oh, he persuaded me to participate in Chinese student discussion groups and various functions.

Q. Were these Chinese student discussion groups organized? Did they have a title or a name? A. I don't remember names.

Q. Where were the discussions held? A. In private homes.

Q. Did you participate in the discussions? A. No, because I did not—at the time I was not interested.

Q. At the time that you offered to share your living quarters with Kee Min Ta, were you then aware of his political activity? A. No, I was not.

Q. When did you find out about his political leanings? A. After he became my roommate.

Q. How soon after he became your roommate? A. I don't recall. It was not very soon but I don't recall the specific occasion on which he talked with me.

Q. There was nothing dramatic such as his saying to you, "Guess what! I'm a communist." A. No.

Q. If he did attempt to influence you, it was on a gradual basis? A. Yes.

Examination of Chi Ch'ao Li

Q. If you had known before he moved in with you that he was politically active, would you have offered to share an apartment with him? A. No. Furthermore, if I had known about him at all, I would not have offered to share an apartment with him. He is not an easy fellow to get along with.

Q. How much time did you spend with Kee Min Ta? A. Not much. In the beginning we went over our lessons together, that being our main purpose in living together.

Q. Do I understand that there was difficulty in your communicating with him because of any barriers? A. Yes. It is a ridiculous barrier but he speaks English with a Western Chinese accent and he hardly speaks any Mandarin Chinese.

Q. And the Chinese dialect with which you are most familiar is the Mandarin dialect. A. Yes.

Q. Do you feel that any of Kee Min Ta's political leanings rubbed off on you? A. I don't think so.

Q. Do I remember correctly your previous testimony that one of the reasons that you shared accommodations with Kee Min Ta is because the language barrier and your different activities made it inevitable that your own privacy would not be invaded or infringed upon? A. Yes.

Q. Mr. Chi, the last allegation concerning you is the reported membership in the American Youth for Democracy. Were you ever a member of that organization and if so, where and for what period of time? A. Yes, I had volunteered that information in the beginning. I was a member of the American Youth for Democracy in the year 1943 when I first entered St. John's College, and the occasion was that one of the students there organized an intercollegiate chapter of the American Youth on the campus and it offered social activities and various slogans in support of the new deal and the war effort and I became a member in that club.

However, that student who organized that club was subsequently expelled from college on personal conduct and the chapter which he organized fell to pieces.

Q. How long was that chapter in existence? A. A period of a few months.

Q. Did you ever belong to any other chapter of the American Youth for Democracy? A. No, I have never rejoined.

Q. Have you ever been in contact with any other members of that organization any time from 1943 to now? A. No.

Q. At the time that you were a member was the American Youth for Democracy devoted to any political affairs? A. None, except the common war effort.

Q. Mr. Chi, in your application for adjustment of status under Section 6, you have set forth that you are afraid to return to China, the country of your birth, nationality and last residence, because of fear of persecution. Item #8 of the application form states that:

> "China is now under control of a communist government and because of my residence and education in United States since I was eleven years old and my strong attachments to and beliefs in traditions of United States, I will be subject to persecution in China."

Is that statement correct? A. Yes, it is correct.

Q. Why do you fear persecution if returned to Communist China? A. Because I don't agree with communism on principle.

Q. What do you think would happen to you personally if you were forced to return to Communist China? A. I have no life left there because it means doing exactly what is

assigned to me.

Q. Do you feel that you would not be able to conform to their requirements? A. Yes. I feel very strongly because

my work is cultural and as a cultural worker more than as a technician, I can only work if I believe in what I am doing.

Q. Would the Chinese Communist Government be able to use you as an entertainer? A. Yes.

Q. Would you be willing to work as an entertainer for the Chinese Communist Government? A. No, I would not be willing and I would not be proficient even.

Q. Why would you not be willing to work for them? A. Because I don't believe in the goals, the exhortation of the communist government.

Q. What would happen to you if you refused to perform for them? A. I may very well be made an example of.

Q. In what way would you be made an example of? A. Imprisonment, "confession."

Q. Do you believe that you would be accepted by the Chinese Communist Government or do you believe that you would be regarded as a spy? A. I would be regarded with great suspicion.

Q. Why? A. Especially since I did not come home when my family came home and on repeated requests by the family for me to come back to China I have consistently refused.

Q. Mr. Chi, about a year ago the government of India was nominated as an agency to which Chinese students in the United States could go for safe conduct back to the mainland of China. Are you familiar with that episode? A. Yes, I am familiar. At that time my mother wrote me again the only letter I have received since I broke off communications.

Q. What did your mother write to you? A. She requested that I avail myself of the opportunity and come back.

Q. Did you go to the Indian Embassy in Washington? A. No, I did not.

Q. Did you have or do you have any desire to return to Communist China? A. No, I do not.

Q. If you were returned to China, would your family be able to shield you from possible persecution? A. No, I believe not and I don't understand their request for my coming back.

Q. Do you believe that your mother's request for you to return was a voluntary or an involuntary request on her part? A. I believe it is involuntary.

Q. Why do you think your mother sent you that letter? A. I could not understand it because for my own part I have broken off communication with the family.

Q. What makes you think that your mother's letter to you was an involuntary act on her part? A. Because she was here in this country and she knows that it is here and she herself went back to China involuntarily because she was unable to support herself and maintain herself and I don't know why she wants me now to come back.

Q. When did your mother and sister and your younger brother return to China? A. In 1950.

Q. Why did you not accompany them to China? A. Because I was fighting my life here. I was building my career and I have my friends here.

Q. If you had been sympathetic to the Chinese communist cause in 1950, could you have returned to China? A. Yes, I could have very easily. I could have gone back on United States State Department grant.

Q. If you had been sympathetic to the Chinese communist government in 1955, could you have returned to China under the auspices of the Indian Embassy? A. I could have.

Q. And you have consistently refused to return to Communist China? A. Yes.

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Q. Actually you are afraid of persecution if you are returned there? A. Yes.

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Q. Are you now for or against communism? A. I am against.

Q. In 1950 were you for or against communism? A. In 1950 I was against.

Q. Have you ever been actively for communism? A. No. Only in the beginning I spoke of my preference for them rather than the Nationalists. That I have mentioned and I did feel.

Q. Am I correct in saying that the only favorable attitude you have taken is attributable to your dislike of the Chinese Nationalist Government? A. Yes.

By Counsel: I have no further questions to ask.

Special Inquiry Officer to Applicant:

Q. Mr. Chi, have you been arrested or charged with a crime at any time since your last hearing here? A. No, I have not.

Q. Has your marital status changed in any way since then? A. No, it has not.

Q. Have you understood all of the questions that have been asked of you at this proceeding? A. Yes, I have.

Q. Do you have any additional statement you would like to make in your own behalf at this time? A. Yes. I am now working as an actor at the Booth Theatre with Arthur Kennedy in a play called "Time Limit," which is about brain washing of an American officer in the Korean prison camp and I myself represent a Chinese soldier in performing brutalities upon the American prisoner and each night as I perform it just makes everything more vivid of what I fear.

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Special Inquiry Officer to Counsel: Mr. Neuman, a transcript of this sworn testimony will be affixed to this record as Exhibit Y.

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If you have nothing further, this examination is now closed.

By Counsel: May I be furnished with a copy of this transcript for my further use in reporting back to the district court, upon the usual assurance it will not be put to any improper use.

By Special Inquiry Officer: Yes, I see no objection to it.

The examination is closed.

I CERTIFY the foregoing to be a true and correct transcript of my stenographic notes in the above case.

ELSA B. TAURIELLO
Stenographer